



EXHIBIT 4
DATE 1/17/06
HB 263

American Civil Liberties Union
of Montana
Power Block, Level 4
P.O. Box 1317
Helena, MT 59624

1/17/2007
Testimony HB 263

Madame Chair and Members of the House Judiciary Committee,

My name is Scott Crichton, Executive Director of the American Civil Liberties Union. We are a membership based organization of 2,400 Montana households dedicated to defending the Constitution and Bill of Rights. I am here today to oppose HB 263 because we have serious concerns about 1) taking DNA before conviction raises for us 4th amendment concerns; 2) this especially raises concerns in the case of juveniles who are not afforded all the same due process protections as an adult who goes through a criminal trial; 3) Section 3(6) allows biological samples to be retained permanently in the DNA database without further notice to the person.

DNA is an effective tool for fighting crime when used correctly. But as with all forms of law enforcement intrusions, the collection of DNA must be balanced against the rights and freedoms of law-abiding citizens. Any effort by law enforcement to expand DNA collection must include an equal effort to protect the public from unnecessary infringements upon their rights, and the security of such information when it is obtained.

Data collection in the United States has grown exceedingly intrusive; yet the safeguards to protect such private information have lagged dismally behind. The increase in personal information and identity theft crimes demands that improved safeguards are in order to protect such personal and private information. Without such protections, such information will remain prone to falling into the hands of those that would use this information for their own private or professional gain, placing innocent people at risk. If such extensive damage can be done through identity theft accomplished by obtaining someone's Social Security number, the bounds of damage that could be done with DNA are endless. If we are going to require people to divulge such information, the least we can do is guarantee its safety and protection.

Regarding our 4th amendment concerns- While there are probable cause provisions outlined for youth in Section 1, Section 2 permits DNA collection when an individual is simply charged rather than convicted. U.S. Courts have generally ruled that DNA banking of convicted felons is permissible either because a "special need" is present where persons have been convicted of crimes with high recidivism rates or because convicted felons have a "diminished expectation of privacy." Neither of these circumstances applies to those persons who have simply been arrested or detained.

Innocent people do not belong in a criminal database. Thousands of people are arrested or detained every year [REDACTED] and never charged with a crime. Allowing DNA



samples from such persons to be uploaded to the state criminal DNA database fundamentally alters the meaning and purpose of the database from one of crime deterrence to population surveillance.

Allowing the retention of DNA from arrestees will encourage pretext arrests as a means for obtaining a person's DNA sample.

The expungement provisions are good and strong, but as you see in several places throughout the bill, you are referred to definitions from the current DNA law 44-6-101 without those definitions being stated.

"Biological sample" means cheek cells removed by using a buccal swab of a type authorized by the department or other container of blood.

"DNA testing" means DNA analysis of materials derived from the human body for purposes of identification consistent with this part.

Section 3 (6) addresses retention of the sample without further proceeding and without notice to the person from whom the sample was taken.

Section 4 calls for the record of the offense to be expunged

■ "DNA record" means DNA identification information stored in the DNA identification index for purposes of establishing identification in connection with law enforcement investigations or supporting statistical interpretation of the results of DNA analysis. The DNA record is considered the objective form of the results of a DNA analysis, such as the numerical representation of DNA fragment lengths, autoradiographs and the digital image of autoradiographs, and discrete allele assignment numbers.

The *DNA profile* is sufficient for identifying a person and consists of a string of numbers describing select, "non-coding" parts of the DNA that are unlikely to contain personal genetic information about health or other characteristics. The *biological sample* however, contains virtually limitless amounts of genetic information and can provide insights into personal family relationships, disease predisposition, physical attributes, and ancestry. The best and only sure way of protecting privacy in association with forensic databases is to destroy the offender samples. You should seriously consider ensuring the Destruction of offender biological samples:

Short of destroying the offender profiles, strong disincentives should be in place to minimize abuse. Imposition of steep penalties, and making unlawful uses of the DNA samples a serious felony are minimal protections that can be advocated.